BINA PURI CONSTRUCTION SDN BHD v. HING NYIT ENTERPRISE SDN BHD

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
RAVINTHRAN PARAMAGURU J
[CIVIL CASE NO: BKI:24-6-1-2015]
8 JUNE 2015

CONSTRUCTION LAW: *Adjudication – Setting aside – Application to set aside decision of adjudicator – Appellant engaged respondent to perform sub-contract works – Dispute over interim payment claims on works done – Whether decision of adjudicator could be reviewed on merits – Whether decision tainted with excess of jurisdiction – Whether there was breach of natural justice – Whether adjudicator possessed inherent jurisdiction – Whether lack of certification of progress or interim claim a bar to adjudication process – Construction Industry Payment And Adjudication Act 2012, ss. 5, 6, 8, 9, 15, 25, 27 & 36*

This was an application under s. 15 of the Construction Industry Payment And Adjudication Act 2012 ('CIPAA') to set aside the decision of the adjudicator. The applicant, a main contractor of a project ('the project'), had engaged the respondent to perform sub-contract works. A dispute, however, arose between the parties over interim payment claims. The respondent served a payment claim under s. 5 of the CIPAA. Under s. 6(2) of the CIPAA, a non-paying party that disputes a payment claim is required to file a payment response stating the amount disputed and the reason for the dispute. Since the applicant did not file a payment response, the entire amount was deemed disputed under s. 6(4) of the CIPAA. The respondent proceeded to serve a notice of adjudication under s. 8 of the CIPAA and pursuant to s. 9 of the CIPAA, after the acceptance of appointment by the adjudicator, the respondent served an adjudication claim on the applicant. The respondent claimed a sum of RM4,370,000 for works done. The respondent claimed payment on Interim Claims No. 29, 30, 31 and 32 and the penultimate claim due from February 2014 to June 2014 as well as other payments due from the applicant. The applicant filed an adjudication response, stating that the interim amounts claimed by the respondent in the said interim claims were subjected to a final certificate and that the interim claims may be adjusted. Thus, the applicant disputed the respondent's claim for the said interim claims and penultimate claim. The applicant further stated that the final draft certificate showed overpayment to the respondent. The respondent had adverted to an ongoing civil suit in the High Court at Kota Kinabalu between the parties where the applicant had counterclaimed for the sum that was overpaid. The adjudicator had cited s. 37 of CIPAA and held that as the civil suit had not been decided it would not affect the adjudication proceedings. The adjudicator also said that the applicant did not serve any payment claim and therefore it could not be conferred the status of 'unpaid party' or 'non-paying' party under the CIPAA. He then proceeded

to hold that he had no jurisdiction to decide the counterclaim of the applicant. In respect of the claim of the respondent under the said interim claims and the penultimate claim, the adjudicator held that in spite of the absence of certificate for some of the claims, the respondent was entitled to rely on s. 36 of the CIPAA and to receive payment within 30 days from the date of the claim. The main point raised by the applicant herein was that the adjudication decision was tainted due to its failure of natural justice and excess of jurisdiction which were grounds to set aside the said decision under the said s. 15 of the CIPAA.

Held (dismissing application with costs):

(1) Under CIPAA, there is no right of appeal against the decision of the adjudicator which is interim in nature or of temporary finality only. Section 15 provides limited grounds on which the decision of the adjudicator may be set aside. Since an application under s. 15 is not an appeal, the decision of the adjudicator cannot be reviewed on merits. In the premises, the criticism of the adjudication decision by the applicant must clearly point to a breach of natural justice or a jurisdictional error in the adjudication process. (para 10)

(2) The adjudication decision was not tainted with 'excess of jurisdiction' merely because the adjudicator refused to decide on the counterclaim of the applicant that was raised in the adjudication response. The dispute raised in the payment claim was in respect of the payments allegedly due under the said interim claims. The applicant did not file a payment response to raise the issue of counterclaim of RM13,544,690.45. In the premises, as the adjudicator did not possess inherent jurisdiction, his jurisdiction was limited to the dispute raised under ss. 5 and 6 *ie* the payment claim and the payment response. The limits of jurisdiction of the adjudicator is a matter governed by law *ie* s. 27 of the CIPAA. Therefore, there could be no breach of natural justice if the adjudication had referred to the correct law to properly direct himself as to what he could or could not do. (paras 11-13)

(3) The adjudicator had considered the case of the applicant that a gross miscalculation was discovered in the preparation of Certificate No. 28. The adjudicator found there was no evidence proffered by the applicant that it had requested the respondent to be on site jointly with the applicant's quantity surveyor to carry out any re-measurement. The adjudicator, having considered the affidavit evidence and written submissions in respect of the overpayment defence, was not persuaded, on a balance of probabilities, that the defence succeeded. On the other hand, he was satisfied that the respondent had proved its claim for interim payments for work done. In the premises, it could not be said that there was a breach of natural justice or that the adjudicator had committed an excess of jurisdiction. The court should be slow to set aside the decision of the adjudicator. (paras 14 & 15)

(4) Lack of certification of progress or interim claim is not a bar to the adjudication process. Section 5 of the CIPAA does not require the existence of certified progress or interim claim before a payment claim could be issued. In fact, s. 25(n) of the CIPAA states that the adjudicator has power to 'decide or declare on any matter notwithstanding no certificate has been issued in respect of the matter'. Under s. 25(m) of the CIPAA, the adjudicator is also empowered to 'review and revise any certificate issued or to be issued'. Thus, even if the contractual agreement between the parties provides for issuance of a certified interim or progress claim, the absence of certification could not deprive the unpaid party from availing the adjudication process. Furthermore, the adjudicator had invoked his power to 'review and revise' under s. 25(m) of the CIPAA to assess the work done by the respondent. He was entitled to do so although no certificate was issued by the applicant as s. 25(m) covers cases where a certificate 'is to be issued' or in other words covers cases where no certificate was actually issued. (para 19)

Case(s) referred to:

Carillion Construction Ltd v. Devonport Royal Dockyard Ltd [2005] EWCA Civ 1358 ***(refd)***

Legislation referred to:

Construction Industry Payment And Adjudication Act 2012, ss. 5, 6(2), (4), 8, 9, 15(b), (d), 25(m), (n), 27(1), (2), 36, 37

For the applicant - Terrence Lee; M/s Lam & Co
Norbert Yapp; M/s Norbert Yapp & Assocs
For the respondent - Roland Cheng; M/s Roland Cheng & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Ravinthran Paramaguru J:

[1] This is an application under s. 15 of the Construction Industry Payment And Adjudication Act 2012 (CIPAA) to set aside the decision of the adjudicator.

Background Facts

[2] The applicant is the main contractor of a project known as "The Proposed Tourist Recreational and Commercial Development (Phase II-KK Times Square)". The respondent was engaged by the applicant to perform sub-contract works known as "RC Structural Work to Shopping Mall, Shops and Elevated Car Park, part of Basement Level and Balance of Basement Work". The sub-contract works were originally awarded to Hing Nyit Enterprise by a letter of award dated 5 October 2011 for the contract price of RM60,411,702.78. Subsequently, the respondent (Hing Nyit Enterprise Sdn Bhd) took over the sub-contract works. The applicant was notified by letter dated 3 October 2012.

[3] By middle of 2014, a dispute arose between the parties over interim payment claims. The respondent issued a notice of dispute under cl. 36.1 of the general conditions of contract on 10 July 2014. On 17 July 2014, the respondent served a payment claim. There was no reply from the applicant and on 17 July 2014, the respondent served a "payment claim" under s. 5 of CIPAA. Under s. 6(2), a non-paying party that disputes a payment claim is required to file a "payment response" stating the amount disputed and the reason for the dispute. However, the applicant did not file a payment response. Thus, under s. 6(4), the entire amount is deemed disputed. On 5 August 2014, the respondent served a notice of adjudication under s. 8. On 19 August 2014, at the request of the respondent, the Kuala Lumpur Regional Centre for Arbitration appointed Mr Ramdas Tikamdas as the adjudicator. Pursuant to s. 9, after the acceptance of appointment by the adjudicator, the respondent served an adjudication claim on the applicant on 26 September 2014. The respondent served the amended adjudication claim on 7 October 2014. In their claim, the respondent claim a sum of RM4,370,000 for work done up to 6 June 2014. The respondent claimed payment on Interim Claims No. 29, 30, 31, 32 and the penultimate claim due from February 2014 to June 2014. The respondent also claimed other payments due from the applicant, ie RM125,185.79 being the amount double charged by the respondent for materials supplied by the applicant, RM46,249.78 for refund of administration fee for unused material returned by the respondent to the applicant and RM122,213.01 for the amount wages for daily workers. The last item was incurred because of a request by the applicant for more daily workers after an overhead crane broke down. However, the respondent gave a credit of RM714,205.18 for materials supplied by the respondent and thus reduced their claim to RM3,949,443.40.

[4] Although, the applicant did not file a payment response, they filed an adjudication response on 20 October 2014. The applicant stated in the adjudication response that the interim amounts claimed by the respondent in the Interim Claims No. 29, 30, 31 and 32 are subject to a final certificate and that the interim claims maybe adjusted. The applicant stated that in preparing Interim Certificate No. 28, they discovered a gross miscalculation in respect of quantities of building materials used and that this was brought to the attention of the respondent. The applicant also stated that they brought to the respondent's notice the fact of alleged overpayment in verbal communication and emails. Thus the applicant disputed the respondent's claim of RM4,370,000 for Interim Claims No. 29, 30, 31, 32 and the penultimate claim. The applicant stated that the final draft certificate shows overpayment to the respondent in the sum of RM13,544,690.45 as at 23 July 2014. The respondent has also adverted to an ongoing civil suit in the High Court at Kota Kinabalu between the parties where the applicant had counterclaimed for the sum of RM13,544,690.45 that was overpaid. The respondent then prayed for the amendment adjudication claim to be dismissed and counterclaimed the sum of RM13,544,690.45 with interest at 8% per annum.

Summary Of Findings Of Adjudicator

[5] At the outset, the adjudicator addressed two preliminary issues, namely the effect of the civil suit and the counterclaim of the respondent. He cited s. 37 of CIPAA and held that as the civil suit has not been decided it will not affect the adjudication proceedings. In respect of the counterclaim of the applicant which was only raised in the adjudication response, the adjudicator said that the applicant did not serve any payment claim and therefore it cannot be conferred the status of "unpaid party" or "non paying" party under the CIPAA. He then proceeded to hold that he has no jurisdiction to decide the counterclaim of the applicant. This holding of the adjudication was subject to criticism by counsel for applicant. He argued that it tainted the adjudication decision with failure of natural justice and excess of jurisdiction which are grounds to set aside the said decision under s. 15 of CIPAA.

[6] In respect of the claim of the respondent under Interim Claims No. 29, 30, 31, 32 and the penultimate claim, his findings in summary are as follows. He held that in spite of the absence of certificate for some of the claims, the respondent is entitled to rely on s. 36 of CIPAA and receive payment within 30 days from the date of the claim. In para. 74 of his decision, the adjudicator dealt with the miscalculation and overpayment defence raised in the adjudication response as follows:

> 74. I have read the contemporary documents in this case filed by both parties and have also read the emails referred to by the Respondent in Table of Paragraph 7 of the Response and have not found a single document that would support the Respondent's contention that they had given notice of the said miscalculation/overpayment to the Claimant nor their justification for the extraordinary step taken by them to "break" and "isolate" the cumulative effect of the Interim Certificate No. 1-27 by a new Certificate No. 28 as if it were "a new Certificate No. 1".

[7] In para. 75, the adjudicator noted that the explanation by the applicant for the need to issue a new Certificate No. 28 as it were a "new Certificate No. 1" to "set the record straight" came about ten months later. In conclusion, he held that the respondent was entitled to the full claim on Interim Claims No. 29, 30, 31, 32 and the penultimate claim amounting RM4,370,000. The adjudicator also considered the final draft certificate of the applicant. After taking into account adjustments, a sum of RM13,544,690.45 is shown as due to the applicant because of overpayment. The adjudicator accepted the following criticisms directed by the respondent at the final draft certificate:

(i) that there was no request by the applicant to attend any final joint measurement;

(ii) it is not a final certificate in the context of the said sub-contract and is a self serving document within no value in law;

(iii) the draft valuation of RM35,541,519.47 cannot stated in the final draft certificate cannot be correct because even the applicant's undisputed Interim Certificate No. 26 shows "work done to-date + valuation works" of RM45,039,716.32;

(iv) further the applicant's Interim Certificate No. 27 shows "work done to-date + valuation works" of RM45,792,080.06; and

(v) further the failure of the applicant to certify the works done under Interims Certificates No. 31, 32, and penultimate certificate cannot prevent the adjudicator to make an assessment of work done under s. 25(n) of CIPAA.

[8] The adjudicator then proceed to rule that the final draft certificate is "an unreliable document and unsafe to be considered". In respect of the claim for double charge in the sum of RM125,185.79 and the claim for daily paid workers in the sum of RM122,213.01, the adjudicator noted that the applicant did not dispute these claims but said that they been accounted for in the final draft certificate. Since the adjudicator ruled that the final draft certificate is unreliable, he allowed these claims.

Applicant To Set Aside Under s. 15

[9] The application to set aside the adjudication decision is made under limbs (b) and (d) of s. 15 of CIPAA which reads as follows:

> 15. Improperly procured adjudication decision
>
> An aggrieved party may apply to the High Court to set aside an adjudication decision on one or more of the following grounds:
>
> (a) the adjudication decision was improperly procured through fraud or bribery;
>
> (b) there has been a denial of natural justice;
>
> (c) the adjudicator has not acted independently or impartially; or
>
> (d) the adjudicator has acted in excess of his jurisdiction.

[10] It must be noted that under CIPAA, there is no right of appeal against the decision of the adjudicator which is interim in nature or of temporary finality only. Section 15 has provided limited grounds on which the decision of the adjudicator may be set aside. Since an application under s. 15 is not an appeal, the decision of the adjudicator cannot be reviewed on merits. In the instant case, the applicant has relied on the ground of breach of natural justice and excess of jurisdiction to set aside the decision of the adjudicator. In the premises, the criticism of the adjudication decision by the applicant must clearly point to a breach of natural justice or a jurisdictional error in the adjudication process. Otherwise, the instant proceeding would be converted to a full blown appeal or a rehearing of the adjudication process.

Counterclaim Of Applicant

[11] The main point raised by the applicant is that the adjudicator committed an error by holding that he had no jurisdiction under the CIPAA to decide on the applicant's counterclaim of RM13,544,690.45. Counsel for applicant submitted that this alleged error resulted in a breach of natural justice as well as in a jurisdictional error. He said that the adjudicator took a restrictive view of his jurisdiction and did not consider the counterclaim which was related to the overpayment defence. Counsel for applicant submitted that adjudicator came to this conclusion because the applicant had not served any payment claim in respect of the counterclaim to the respondent under s. 5 of CIPAA. Counsel for applicant said that the applicant had no opportunity to address this point as it was not raised by the parties. He said that the adjudicator could have invoked s. 25 of CIPAA which grants wide ranging powers to the adjudicator before he decided that he had no jurisdiction to consider the counterclaim. Counsel for applicant even submitted that under s. 25, the adjudicator could have appointed an independent expert to determine technical matters. With due respect, I disagree that the adjudication decision is tainted with "excess of jurisdiction" merely because the adjudicator refused to decide on the counterclaim of the applicant that was raised in the adjudication response. My reasons are as follows. Section 27(1) of CIPAA clearly circumscribes the jurisdiction of the adjudicator. It reads as follows:

> 27. Jurisdiction of adjudicator
>
> (1) Subject to subsection (2), the adjudicator's jurisdiction in relation to any dispute is limited to the matter referred to adjudication by the parties pursuant to sections 5 and 6.

[12] The dispute raised in the payment claim is in respect of the payments allegedly due under the said interim claims. The applicant did not file a payment response to raise the issue of counterclaim of RM13,544,690.45. In the premises, as the adjudicator does not possess inherent jurisdiction, his jurisdiction is limited to the dispute raised under ss. 5 and 6, ie the payment claim and the payment response. Sub-section (2) provides for the enlargement of the jurisdiction of the adjudicator by agreement. It reads as follows:

> (2) The parties to adjudication may at any time by agreement in writing extend the jurisdiction of the adjudicator to decide on any other matter not referred to the adjudicator pursuant to sections 5 and 6.

[13] However, in the instant case, it is common ground that the parties did not execute an agreement pursuant to the above provision to extend the jurisdiction of the adjudicator to enable him to decide the counterclaim of the applicant. In the premises, the adjudicator cannot be faulted for holding that he had no jurisdiction to decide the counterclaim of the applicant that was raised belatedly in the adjudication response. Counsel for applicant also submitted that he had no opportunity to argue the said point as it was not

raised in the submissions and there it resulted in a breach of natural justice. The limits of jurisdiction of the adjudicator is a matter that is governed by law, ie s. 27 of CIPAA. Therefore, there can be no breach of natural justice if the adjudication had referred to the correct law to properly direct himself as to what he can or cannot do. In any event, although the adjudicator declined to decide the counterclaim of the applicant that was only raised in the adjudication response, he considered the overpayment defence which is related to the counterclaim of the applicant. I shall consider it below.

Overpayment Defence

[14] In my opinion, there is no ground to hold that the adjudicator gave short shrift to the overpayment defence to the extent that it resulted in a breach of natural justice or excess of jurisdiction. He considered the case of the applicant that a gross miscalculation was discovered in the preparation of Certificate No. 28 as stated in the adjudication response. The adjudicator found that there is no evidence proffered by the applicant that it had requested the respondent to be on site jointly with the applicant's quantity surveyor to carry out any re-measurement. The adjudicator also found no evidence that the notice of miscalculation/overpayment had been given by the applicant for their extraordinary step to "break" and "isolate" the cumulative effect of the Interim Certificate No. 1-27 by a new Certificate No. 28 as if it were "a new Certificate No. 1". He said that the explanation only came in the adjudication response about ten months later. In the premises, the overpayment defence which is related to the counterclaim had been given consideration by adjudicator. Similarly, for reasons given earlier, he rejected the draft final certificate. As I said earlier, s. 15 does not envisage that the decision of the adjudication can be reviewed on its merits. Therefore, it is immaterial if the adjudicator had erred in his finding of facts. The decision of an adjudicator is only of temporary finality pending final settlement of accounts. In the premises, unless that there is a clear cut breach of natural justice or excess of jurisdiction, the court should be slow to set aside the decision of the adjudicator. This approach has been adopted in England where the adjudication process was introduced much earlier. In oft-cited *Carillion Construction Ltd v. Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358, Chadwick LJ said as follows:

> The task of the adjudicator is to find an interim solution which meets the needs of the case. Parliament may be taken to recognise that, in the absence of an interim solution, the contractor (or sub-contractor) or his sub-contractors will be driven into insolvency through a wrongful withholding of payments properly due. The statutory scheme provides a means of meeting the legitimate cash-flow requirements of contractors and their sub-contractors ... The need to have the 'right' answer has been subordinated to the need to have an answer quickly ...
>
> 87. In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the scheme must be to pay the amount that he has been ordered to pay by the adjudicator.

> If he does not accept the adjudicator's decision as correct (whether on the facts or in law), he can take legal or arbitration proceedings in order to establish the true position. To seek to challenge the adjudicator's decision on the ground that he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest cases) is likely to lead to a substantial waste of time and expense ...

[15] In conclusion, in the instant case, the adjudicator had considered the affidavit evidence and written submissions in respect of the overpayment defence. He was not persuaded on a balance of probabilities that the defence succeeded. On the other hand, he was satisfied that the respondent had proved its claim for interim payments for work done. In the premises, it cannot be said that there was a breach of natural justice or that the adjudicator had committed excess of jurisdiction.

Other Issues

[16] After the affidavit in support was filed and the first written submission was filed, the applicant raised two new issues. It is in respect of the due date of one of the amounts and the date of the payment claim. The claims stated in the payment claim dated 17 July 2014 are as follows:

> This payment claim is in respect of the following items in the said Project:
>
> A. payment claim for the sum of RM4,370,000.00 as at 21.07.2014 for work done pursuant to clause 8, 9, 10 and 23 of the said Letter of Award.
>
> B. double charge for material supplied by you amounting to RM125,185.79 pursuant to clause 11, 12, 13 and 23 of the said Letter of Award.
>
> C. supply by our client of daily paid workers amounting to RM122,213.01 pursuant to clause 4, 12, 24 and 23 of the Letter of Award.
>
> D. unused material returned to you amounting to RM46,249.78 pursuant to clause 11, 13 and 23 of the said Letter of Award.

[17] Counsel for the applicant submitted that the due date for payment of the penultimate claim amounting to RM4,370,000 was stated as 21 July 2014, whereas the date of issuance of the payment claim was 17 July 2014. Therefore, he submitted that the payment claim was premature and invalid and that the statutory adjudication process was fatally flawed. Counsel for respondent replied that under s. 5 of CIPAA, there is no requirement that the amount claimed must be due. He submitted that the only requirement is that the due date must be stated in the payment claim. In the alternative, counsel for respondent argued that if there is any requirement that the amount claimed in the payment claim must be due before adjudication can arise, the requirement had already been met by the time the notice of adjudication was issued by the respondent on 5 August 2014. Counsel for respondent also submitted that in any event, the argument would only apply to the sum of RM865,000 out of the total of RM4,370,000 as only the former

sum was due on 21 July 2014. The rest were due before 17 July 2014. I find that the argument of the applicant in respect of the due date of the claim to be without merit for the following reasons. It is common ground that this issue was never raised before adjudicator. For this reason alone, in my view, the applicant should not be permitted to raise it now. In any event, as argued by counsel for respondent, the entire amount stated of RM4,370,000 was stated in the payment claim was due by the time the notice of adjudication was issued.

[18] The other issue that was belatedly raised is this. Counsel for applicant submitted that in the instant case, cl. 23 of the general conditions of contract between the parties provided for certification of a progress claim by the applicant. Under the said clause, payment is due only 45 days after the date of certification. Counsel for applicant submitted that the payment claim is premature because there was no certification. Therefore, he submitted that a cause of action can only accrue when "there is a right to payment and not when there is a mere entitlement to payment". He then submitted that s. 36 of CIPAA should not be invoked because there is a written agreement in this case. Section 36 reads as follows:

> 36. Default provisions in the absence of terms of payment
>
> (1) **Unless otherwise agreed by the parties**, a party who has agreed to carry out construction work or provide construction consultancy services under a construction contract has the right to progress payment at a value ...
>
> (3) The frequency of progress payment is:
>
> (a) monthly, for construction work and construction consultancy services; and
>
> (b) upon the delivery of supply, for the supply of construction materials, equipment or workers in connection with a construction contract.
>
> (4) **The due date for payment under subsection (3) is thirty calendar days from the receipt of the invoice**. (emphasis added)

[19] This argument of counsel for applicant, for obvious reasons, must be considered with utmost care and circumspection. This argument, if accepted, would mean that in cases when the certifying authority of a progress or interim claim is the main contractor, a sub-contractor may not be able avail the adjudication process. All that the main contractor has to do to avoid the CIPAA regime altogether and defeat the intention of Parliament is to refuse certification of progress or interim claims. In my respectful opinion, lack of certification of progress or interim claim is not a bar to the adjudication process. Section 5 does not require the existence of certified progress or interim claim before a payment claim can be issued. In fact, s. 25(n) of CIPAA states that the adjudicator has power to "decide or declare on any matter notwithstanding no certificate has been issued in respect of the

matter". Under s. 25(m), the adjudicator is also empowered to "review and revise any certificate issued or to be issued". This simply means, even if the contractual agreement between the parties provides for issuance of a certified interim or progress claim, the absence of certification cannot deprive the unpaid party from availing the adjudication process. Furthermore, in the instant case, the adjudicator, in para. 80 of his decision, invoked his power to "review and revise" under s. 25(m) to assess the work done by the respondent. He is entitled to do so although no certificate was issued by the applicant as s. 25(m) covers cases where a certificate "is to be issued" or in other words covers cases where no certificate was actually issued.

[20] For all the above reasons, I shall dismiss the application with costs of RM10,000.